INDEX

Table of Contents

	PAGE
Grounds For Rehearing	1
Conclusion	7
Certificate of Counsel	7
Proof of Service	8

Table of Authorities

Cases

Bailey v. Patterson, 369 U.S. 31 (1962)	3
Ex Parte Bransford, 310 U.S. 354 (1940)	2
Louisville & Nashville R. C. v. Public Service Commission of Tennessee, 249 F. Supp. 894 (M.D. Tenn. 1966)	5, 6
Phillips v. United States, 312 U.S. 246 (1941)	3
Snowden v. Hughes, 321 U.S. 1 (1944)	6

Statutes

Interstate Commerce Act, 54 Stat. 899 (1940), 49 U.S.C. 1	4
Tennessee Code Annotated, Chapter 9, Title 675, Section 67-901-931	2
28 U.S.C., §1253	3
28 U.S.C., §1337	3, 4
28 U.S.C., §1343(3), *(Civil Rights Act)*	5, 6
28 U.S.C., §2281	3
U. S. Const. Amend. XIV, Sec. 1	5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 942

ALTERMAN TRANSPORT LINES, INC., ET AL.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.,
Appellees.

APPELLANTS' PETITION FOR REHEARING

Appellants present their Petition for a Rehearing of the above entitled case, and, in support thereof, respectfully show:

Grounds for Rehearing

On March 13, 1967, this Court accepted jurisdiction over this appeal by affirming the judgment of a specially convened District Court. This District Court, from which a direct appeal to this Court was taken, rendered its decision as a three-judge court. However, it gave no basis for so doing other than stating that Petitioners requested same in their Bill of Complaint (see the opinion below, set out in Jurisdictional Statement, Appendix I at p. 1-A). Moreover, every allegation in Petitioners' Bill of Complaint constituting the basis for three-judge court jurisdiction, i.e., the

per se unconstitutionality of the Tennessee state statute in question, was rejected by the Court below as not raising a substantial Federal question. The *only* grounds on which the said Court found a substantial Federal question was based upon the discriminatory *application*, against Petitioners, by the Tennessee tax officials, of *Tennessee Code Annotated* 67-901-931. This Court has held on numerous occasions, that the discriminatory application of a state statute, constitutional on its face, does not raise the kind of Federal question which sustains three-judge court jurisdiction (see, for example, *Ex Parte Bransford*, 310 U.S. 354 [1940]). Thus, the lower Court's decree of a final judgment as a three-judge court is inconsistent with, and contradictory to, the conclusions which the Court reached in its opinion.

Defendants recognize the incorrectness and the inconsistency of the action of the Court below, and did not request that this Court affirm the lower Court decree. *The only motion before the Court is Defendants' Motion to remand the case to the Sixth Circuit Court of Appeals.* This Motion is based on the contention that the Court below improperly rendered a final judgment as a three-judge court. It is concerned entirely with the proposition that, as there is nothing in the lower Court opinion which justifies the invoking of three-judge court jurisdiction, there is no basis for sustaining the jurisdiction of this Court in this appeal. Defendants' conclusion that it is impossible for this Court to affirm a three-judge opinion which states no basis for three-judge court jurisdiction, and that, if the opinion of the lower Court is to be affirmed, it must be done by the Circuit Court of Appeals, is uncontrovertable. *In order for this Court to exercise jurisdiction over this direct appeal, some portion of the decision below must be reversed.* It is completely without precedent for this Court to accept juris-

diction over a direct appeal by affirming a lower court opinion which contains no basis for three-judge court jurisdiction. Unless this case is required to be heard and determined by a district court of three judges under 28 *U.S.C.* §2281, it cannot be brought to this Court on direct appeal under 28 *U.S.C.* §1253. The mere fact that a specially convened district court has acted as a three-judge court is insufficient to invoke the jurisdiction of this Court on direct appeal unless it is determined by this Court that the Bill of Complaint does *in fact* contain a basis for three-judge court jurisdiction, i.e., an allegation which raises a substantial Federal question on the grounds that a state statute is unconstitutional on its face (see, for example, *Bailey v. Patterson*, 369 U.S. 31 [1962], and *Phillips v. United States*, 312 U.S. 246 [1941]).

While there are several allegations in Petitioners' Bill of Complaint which meet this requirement and justify the invoking of three-judge court jurisdiction, *all* these arguments were rejected by the Court below. Petitioners cannot ascertain the nature of the grounds upon which this Court concluded that a substantial Federal question was raised as to the *per se* unconstitutionality of the State of Tennessee Statute. However, it is respectfully submitted that whatever the basis for this Court having found the existence of a substantial Federal question sufficient to sustain three-judge court jurisdiction, such a conclusion is completely inconsistent with the lower Court's opinion.

In rejecting, in its opinion, all arguments which raised the kind of substantial Federal question necessary to sustain three-judge court jurisdiction, the lower Court dismissed the identical arguments which invoke Federal jurisdiction under 28 *U.S.C.* §1337 (see the Jurisdictional Statement at pp. 24-31 as to jurisdiction under Section 1337; see also Appellants' Opposition to Motion to Dismiss at p. 2 where

the same ground as set forth on pp. 24-31 of the Jurisdictional Statement is cited as a basis for three-judge court jurisdiction). Section 1337 provides for Federal jurisdiction without regard to the amount in controversy in situations where interstate commerce is unduly restrained in violation of the *Interstate Commerce Act*, or other Federal acts, by state statute or otherwise. The lower Court concluded that jurisdiction should be denied under this Section despite its holding as to the discriminatory application of the Tennessee taxing statute and the substantial Federal question which it felt was raised by this practice; however, when the *additional* Federal question concerning the *per se* unconstitutionality is added (which was not considered by the lower Court) Federal jurisdiction is definitely invoked under Section 1337 of the *Code*. Thus, if this Court has decided that a three-judge court kind of substantial Federal question is present, then there must be a reversal of the lower Court on at least the issue of Section 1337 jurisdiction. A final judgment rendered by a three-judge district court can be affirmed by direct appeal to this Court only, if in fact, there is a basis for three-judge court jurisdiction in the Bill of Complaint. Since the Court below rejected, in its opinion, the presence of a basis for three-judge court jurisdiction, an affirmance of the *judgment* below necessitates, for the reasons stated, a reversal of the lower Court's *opinion* on the merits of this appeal.

There is an additional reason why the decision below should be reversed. The lower Court concluded that the State Courts of Tennessee provide no adequate remedy to redress Defendants' discriminatory taxation of Petitioners' property. An affirmance of this opinion leaves Petitioners with *no* forum in which to seek relief from what is admitted by the Defendants to be a discriminatory taxing practice, and from a practice which has been held by the United

States District Court in Tennessee to result in a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (see *Louisville & Nashville R. Co. v. Public Service Comm'n of Tenn.*, 249 F. Supp. 894 [M.D. Tenn. 1966]). As to certain allegations in the instant case the Court below specifically held that there was no distinction between the facts of this case and those in the *L&N* case except the amount of the discriminatory taxation involved (see the Opinion below set out in the Jurisdictional Statement, Appendix I at page 11-A, footnote 5). In both cases the District Courts held that as to the systematic, intentional, and discriminatory taxing practice of Defendants, there is no remedy in the State Courts of Tennessee. The *L&N* Court summarized (in effect) the holding of the two cases on this point as follows:

> (*Louisville & Nashville R. Co. v. Public Service Comm'n of Tenn., supra,* at p. 249 F. Supp. 904). . . . Since there is no plain, speedy, and efficient remedy in Tennessee to correct the intentional and systematic violations of either its own law or the Fourteenth Amendment, *Federal declaratory injunctive relief is not only proper but necessary for the protection of plaintiff's constitutional rights.* (emphasis added).

In the *L&N* case the interstate carrier was discriminated against in the sum of many millions of dollars, and is rightfully provided a legal forum in the federal courts. The carriers in the instant case are discriminated against in terms of thousands of dollars, (with less than $10,000 being involved in any single subdivision of Tennessee) and are denied a forum in *any* court. The reasons for this inequitable situation result from the opinion of the Court below to the effect that federal jurisdiction cannot be invoked under the *Civil Rights Act* (28 *U.S.C.* 1343(3)) in "tax matters". Such a conclusion runs counter to previous

opinions of this Court (see *Snowden v. Hughes*, 321 U.S. 1, 9 [1944]) and is illogical and incompatible with a fair and just legal system.

An affirmance of the lower Court opinion gives free rein, within certain dollar limits, to the State of Tennessee and other states, to *tax any given segment of society in a discriminatory manner*, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The group or person discriminated against will have no redress to the Courts unless, as in the *L&N* case, they are wealthy enough to have tremendous sums of money involved in the discrimination. It is inconceivable that this Court would approve a jurisdictional rule, applicable in all fifty states, which penalizes a person who is not wealthy enough to be discriminated against in large amounts. The repercussions that the adoption of such a rule would have on jurisdictional practice in the United States District Courts are literally catastrophic. *States and/or local subdivisions could discriminate, on the basis of race, religion, wealth, or as in the instant case, on interstate carriers as opposed to other property owners, provided they* **accomplished this discrimination through taxation** *and within certain dollar limits. Under the opinion below, "redheads" may be taxed in a discriminatory manner in favor of "blondes" similarly situated under the law, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and a federal forum will be denied unless the discrimination results in a tax detriment to each individual "redhead" of at least $10,000.00. The only possibility for federal jurisdiction in a tax discrimination situation is 28 U.S.C. 1343(3).*

If the lower Court opinion is affirmed, it is not difficult to foresee the groups or persons who will, in the future, be substituted for Alterman Transport *et als.*, and the new

types of taxes which will be imposed with an impact similar to that of the Tennessee Ad Valorem Tax. It is respectfully submitted that the unconscionable effects which must inevitably flow from an affirmance of the opinion below necessitate a reversal by this Court of its previous decision in this case.

Conclusion

For the foregoing reasons it is respectfully urged that the Petition for a Rehearing be granted, and that, upon further consideration, the judgment of the Three-Judge District Court, Middle District of Tennessee, be reversed.

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Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I, J. G. Lackey, Jr., counsel for the above named Appellants, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

J. G. LACKEY, JR.,

PROOF OF SERVICE

I, J. G. Lackey, Jr., one of the attorneys for the appellants herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the 4th day of April, 1967, I served copies of the foregoing Petition for Rehearing to the Supreme Court of the United States on the several parties thereto by mailing copies thereof with postage prepaid to their attorneys as follows:

Honorable Milton P. Rice
Supreme Court Building
Nashville, Tennessee
(State Board of Equalization of Tennessee)

Honorable Eugene W. Ward
Public Service Commission
Cordell Hull Building
Nashville, Tennessee
(Public Service Commission)

Honorable Seymour Samuels, Jr.
Metropolitan Government
204 Courthouse
Nashville, Tennessee
(Metropolitan Government of Nashville & Davidson County, Beverly Briley, Mayor, and Metropolitan Trustee)

Honorable William H. Williams
County Attorney
Shelby County Courthouse
Memphis, Tennessee
(County Attorney for Shelby County, Jack Ramsey, Ch. County Commission, & Riley Garner, Trustee)

Honorable Patrick Johnson, Sr.
Commerce Title Building
Memphis, Tennessee
(City of Memphis, William B. Ingram, Mayor, and C. W. Crutchfield, Controller)

Honorable William W. O'Hearn
Commerce Title Building
Memphis, Tennessee
(City of Memphis, William B. Ingram, Mayor, and C. W. Crutchfield, Controller)

Honorable Earl S. Ailor
Bank of Knoxville Building
Knoxville, Tennessee
(Attorney for Knox County, C. Howard Bozeman, County Judge, and Robert L. Broome, Trustee)

Hon. W. P. Boone Daugherty
Deputy Director of Law
City of Knoxville
Knoxville, Tennessee
(City of Knoxville and Leonard Rogers, Mayor)

Honorable Eugene N. Collins
Honorable Ellis K. Meacham
1115 Hamilton Bank Building
Chattanooga, Tennessee
(City of Chattanooga, and Ralph Kelly, Mayor)

Honorable James F. Turner
600 Maclellan Building
Honorable Robert M. Summitt
415 Maclellan Building
Chatanooga, Tennessee
(Attorney for Hamilton County, Chester Frost, County Judge, and Joe W. Richardson, Trustee)

J. G. LACKEY, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ALTERMAN TRANSPORT LINES, INC., ET AL. *v.* PUBLIC SERVICE COMM'N OF TENNESSEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 942. Decided March 13, 1967.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.